UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	CASE NO. 90100183
BROADWAY TIRE, INC., Respondent.	)	

Appearances:

Frederick E. Newman, Esquire
For the Complainant
Robert T. Mees, Jr., Esquire
For the Respondent

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. Procedural History

On April 14, 1989, the United Stat
and Naturalization Service (INS), e
Fine (NIF) on Broadway Tire, Inc.
Mr. Otho Robinson. The Notice of Intent to Fine alleged 11 violations of § 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) for failure to prepare Forms I-9, 4 violations of § 274A(a)(1)(B) of the Act for failure to properly complete Section 2 of the Form I-9, 4 violations of § 274A(a)(1)(B) of the Act for failure to verify continued employment eligibility of employees, and 3 violations of § 274A(a)(1)(B) of the Act for failure to ensure that employees properly completed Section 1 of the Form I-9.

Finding that the INS did not receive a timely request for hearing from Respondent, a Final Order was issued on May 30, 1989. In response to the Final Order, Respondent, through

counsel, claimed that it had timely requested a hearing. Respondent failed to establish to Complainant's satisfaction that it had timely requested a hearing and Respondent failed to pay the $3,850.00 civil monetary penalty demanded by the INS Notice of Intent to Fine and subsequent Final Order.

On August 29, 1989, the INS filed a Complaint for Judgment, United States of America, et al v. Broadway Tire, Inc., Civ. #S-89-1176-RAR (E.D. CA). INS and Respondent filed motions for summary decision. On April 19, 1990, the District Court denied the Service motion for summary decision and found that Respondent had timely requested a hearing and ordered that Respondent was entitled to a hearing before an ALJ.

On May 29, 1990, Complainant, through its attorney, Frederick E. Newman, filed a Complaint, alleging 20 violations of the record keeping and verification provisions of IRCA in violation of § 274A(a)(1)(B) of the Act and seeking a civil monetary penalty of $3,550.00.

On June 5, 1990, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the Administrative Law Judge in the case and setting the case for hearing at Sacramento, California, on a date to be set at the discretion of this court.

On July 16, 1990, Respondent filed its Answer to the Complaint alleging six affirmative defenses.[1]

On August 9, 1990, Complainant filed a Motion to Strike Redundant, Immaterial, Impertinent, Irrelevant and Unsupported Affirmative Defenses.

On August 10, 1990, Complainant filed a Motion for Partial Summary Decision.

On August 21, 1990, Respondent filed a Response to the Motion to Strike Affirmative Defenses and Request for Sanctions.

ed an Order granting Complainant's
s fifth ("set-off" for costs of
awsuit) and sixth ("good faith")

ive defenses were: (1) the
use of action; (2) that Respondent
e law; (3) that the Complaint is
tions; (4) that the Complaint is
s; (5) that Respondent is entitled
netary penalty because of fees and
ully defending a case in federal
in good faith.

affirmative defenses based upon documents, pleadings, and memoranda before me at that time. I further ordered Respondent, pursuant to 28 C.F.R. § 68.6(c)(2), to set forth a "statement of facts supporting the other four affirmative defenses alleged in his Answer or file an appropriate motion to dismiss."

Also, on August 30, 1990, I issued an Order Denying Complainant's Motion for Partial Summary Decision, on the ground that it was premature in view of the fact that genuine issues underlying Respondent's four affirmative defenses, which had not been stricken, were as yet undecided.

On October 3, 1990, Respondent, in lieu of filing a supplemental Answer detailing the facts in support of its four remaining affirmative defenses, properly chose to file a Motion to Dismiss and for Summary Judgment. However, Respondent's Motion to Dismiss did not address and detail both factually and legally its alleged affirmative defenses of failure to state a cause of action, substantial compliance, statute of limitations, and laches.

On October 15, 1990, Complainant renewed its Motion to Strike Redundant, Immaterial, Impertinent, Irrelevant and Unsupported Affirmative Defenses.

Also, on October 15, 1990, Complainant filed a Renewed Motion for Summary Decision.

On October 19, 1990, I issued an Order Denying Respondent's Motion to Dismiss for Complainant's alleged failure to state a cause of action. Failure to state a cause of action was Respondent's first affirmative defense. I held that the instant Complaint more than satisfied the requirements for an 8 U.S.C. § 1324a proceeding, as required by 28 C.F.R. § 68.6. I further found that the instant Complaint satisfied the requir
Rule 8(a)(2) of the Federal Rules of Civil Procedure by
Respondent fair notice of the nature and gr
(against it) and a general indication
involved.

Also, on October 19, 19
Complainant's Renewed Motion
third, and fourth affirmative
to detail, either in its Motio
its Answer, the facts in su
defenses of substantial compl
laches, as required by 28 C.F.
my August 30, 1990 Order.

On October 24, 1990, I is
Motion for Summary Decision in
it was entitled to a "set off"
of attorney's fees and costs

the INS Complaint for judgment, in which the district court found that Respondent had timely requested a hearing and ordered that Respondent was entitled to a hearing before an ALJ. I gave Respondent's "set off" theory exhaustive treatment in my Order, including instruction that Respondent would have to pursue its counterclaim for costs in the U. S. District Court. Respondent had initially plead that it was entitled to a "set off" as its fifth affirmative defense in its original Answer to the instant Complaint. I had previously stricken this affirmative defense theory, by my Order dated August 30, 1990.

By separate Order dated October 24, 1990, I ordered Respondent to reply to Complainant's Renewed Motion for Summary Decision on or before November 2, 1990.

By Order dated January 10, 1991, I made a preliminary finding granting Complainant's Motion for Summary Decision, both as to liability and fine amount, for the reasons cited in Complainant's August 10, 1990, Motion for Summary Decision and Renewed Motion of October 15, 1990. I further held that I took the matters as established adversely to Respondent, pursuant to 28 C.F.R. § 68.21(c)(2), due to Respondent's failure to respond to Complainant's Motion as I ordered on October 24, 1990.

II. Legal Standards for Deciding Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.36 (1989); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact as shown by the pleadings, affidavits, discovery, oticed matters. Celotex Corp. v. Catrett, 477 8, 2555, 91 L.Ed.2d 265 (1986). U.S. v. Weymoor Investments, Ltd., OCAHO Case #88100184 (ALJ Robbins, May 12, 1989). A material fact is one which controls the outcome of the litigation. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); see also, Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

In other words, summary decision will be granted only if the record, when viewed in its entirety, is devoid of a genuine issue as to any fact that is outcome determinative. See Anderson v. Liberty Lobby, Inc., supra; see also, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material

Fact, 99 F.R.D. 465, 480 ("An issue is not material simply because it may affect the outcome. It is material only if it must inevitably be decided."). A fact is "outcome determinative if the resolution of the fact will establish or eliminate a claim or defense; if the fact is determinative of an issue to be tried, it is "material." Id.

Rule 56(c) of the Federal Rules of Civil Procedure also permits, as the basis of summary decision adjudications, consideration of any "admissions on file." See, e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See also Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) ("If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted."); and, U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admission on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.8(c)(1) (1989). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Bordern, 110 F.R.D. 696 (S.D. W. Va. 1986) (". . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment."); see also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 30 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

Finally, in analyzing the application of summary judgment/summary decision in administrative proceedings, the Supreme Court has held that the pertinent regulations must be "particularized" in order to cut off an applicant's hearing rights. See Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) (". . . the standard of 'well controlled investigations' particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence . . . .).

III. Legal Analysis Supporting Summary Decision, Findings of Fact, and Conclusions of Law

A. Affirmative Defenses

Respondent plead six affirmative defenses. As stated in my prior orders, it is my view that these affirmative defenses are legally and/or factually insufficient to preclude summary decision against Respondent. Every Decision and Order relating to the six stricken affirmative defenses is chronicled at Section I. Procedural History, above. The Decisions and Orders striking

Respondent's affirmative defenses, themselves, are part of this record of proceedings and are herein incorporated by reference. Having previously fully analyzed and discussed each of the affirmative defenses, I will not reiterate my analysis and decisions herein.

B. Respondent's Failure to Respond to Complainant's Motion for Summary Decision as Ordered by this Court

On August 10, 1990, Complainant filed a Motion for Partial Summary Decision. On October 15, 1990, Complainant filed a Renewed Motion for Summary Decision. On October 24, 1990, I issued an Order directing Respondent to respond to Complainant's Renewed Motion for Summary Decision on or before November 2, 1990. Respondent failed to respond to Complainant's Motion for Summary Decision as of January 10, 1991. Accordingly, I took the matters asserted in Complainant's Renewed Motion for Summary Decision as established adversely to Respondent, pursuant to 28 C.F.R. § 68.21(c)(2), and granted Complainant's Motion for Summary Decision as to liability and civil monetary penalty on that basis.

C. Admissions by Respondent

On July 17, 1990, Complainant served Respondent's counsel with Complainant's Request for Admissions of Fact and Authenticity of Documents; Exhibit 101 attached to Complainant's Motion for Partial Summary Decision, filed August 10, 1990. On July 17, 1990, Respondent filed its Response to Request for Admissions of Fact and Response to Request for Admissions of Authenticity of Documents; Exhibit 101A attached to Complainant's Motion for Partial Summary Decision, filed August 10, 1990. Complainant contends that Respondent admitted the essential facts supporting 13 of the 20 record keeping and verification violations cited in the Complaint.

I have reviewed all of the documents submitted by the parties, particularly Respondent's Responses to Request for Admissions. The Respondent has directly admitted hiring each of the 20 individuals named in the Complaint, and has further admitted to hiring 19 of the 20 after November 6, 1986, to work in the United States. All Forms I-9, with supporting documents attached, submitted in this case (Exhibits 1-9 attached to Complainant's Motion to Strike Redundant, Immaterial, Impertinent, Irrelevant and Unsupported Affirmative Defenses filed August 9, 1990; and Exhibit 10 attached to Complainant's Renewed Motion for Summary Decision filed October 15, 1990) are true and correct copies of the forms presented by Respondent to INS agent Ivory Shine during the February 27 - March 15, 1989, investigatory inspection process.

I find noncompliance on the face of the nine defective Forms I-9 provided for my examination and cited at Counts II - IV of the Complaint.

Respondent admits that it failed to prepare Forms I-9 for 9 of the 11 individuals cited at Count I of the Complaint.

I, therefore, conclude that Respondent has admitted essential elements of the 18 of the 20 allegations in this case, except as to the two violations relating to Tim Hinnen (Count IA5) and Mark Lozano (Count IA6). Complainant has, therefore, demonstrated by a preponderance of the evidence, through Respondent's admissions and authentication of documents it presented for inspection, that 18 of the 20 violations did occur as alleged.

D. Respondent's Denial that it Failed to Prepare Two I-9's

Respondent specifically denied that it failed to prepare Forms I-9 for Tim Hinnen (Count IA5) and Mark Lozano (Count IA6). See responses 12 and 15 of Respondent's Response to Request for Admissions of Fact and Response to Request for Admissions of Authenticity of Documents; Exhibit 101A attached to Complainant's Motion for Partial Summary Decision, filed August 10, 1990.

Special Agent Ivory Shine swears in his declaration dated September 28, 1990, attached in support of Complainant's Renewed Motion for Summary Decision filed October 15, 1990, that Forms I-9 were not presented for Mr. Hinnen or Mr. Lozano at the time of the audit nor subsequent to the audit as of September 28, 1990. This declaration of the case agent is uncontroverted by Respondent. Because Respondent failed to oppose Complainant's Renewed Motion for Summary Decision, I take this matter as established adversely to Respondent pursuant to 28 C.F.R. § 68.21(c)(2), and find that Respondent failed to prepare Forms I-9 for Mr. Hinnen and Mr. Lozano.

E. Civil Monetary Penalties

It is my judgment that Respondent has violated § 274A (a)(1)(B) of the Act, in that it hired for employment in the United States, after November 6, 1986, 20 individuals without complying with the verification requirements of 8 U.S.C. § 1324a(b)(1). I must, therefore, assess a civil monetary penalty pursuant to § 274A(e)(5) of the Act. The statute states, in pertinent part, that

> [with respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged,

> the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and history of previous violations.

8 U.S.C. § 1324a(e)(5).

I have, heretofore, consistently applied a mathematical analysis to the mitigating factors in determining what is a fair and reasonable civil penalty to assess. See United v. Felipe, OCAHO Case No. 89100151 (Oct. 11, 1989), aff'd by CAHO, November 29, 1989; see also, United States v. Juan V. Acevedo, OCAHO Case No. 89100397 (Oct. 12, 1989); United States v. Basim Aziz Hanna, DBA Ferris and Ferris Pizza, OCAHO Case No. 89100331 (July 19, 1990) (Order Granting Complainant's Motion for Summary Decision and Setting Case for a Hearing to Determine Appropriate Civil Money Penalty). Under the Felipe formula, I give equal weight to each of the five factors ($180.00 per mitigating factor, which represents the difference between $100.00, the minimum that can be accessed, and $1,000.00, the maximum that can be accessed, divided by five.) and from an assessment of each of those factors arrive at an appropriate civil penalty. I do this by deducting from the maximum allowed assessment of $1,000 per violation, a percentage of $180.00 per factor, depending upon what percentage I determine should be mitigated on that factor. For example, if I find that each factor should be fully mitigated, I will deduct $180.00 x five or $900.00 from $1,000.00 and assess a minimum fine of $100.00.

Applying the Felipe formula to the undisputed evidence in this case, I make the following findings:

I have determined that Broadway Tire, Inc., employs approximately 41 people, which I find to be a small to medium-size business. Therefore, I will mitigate the fine for size of business.

Despite Respondent's assertions of good faith, I agree with Complainant that evidence of good faith is lacking in the record. The Respondent did receive an educational visit on July 30, 1987, prior to the Forms I-9 availability. Also, upon conclusion of the I-9 audit, the Respondent received a warning
olations not charged in the Complaint.
upport an argument of good faith.
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are serious in the framework of
re the 11 violations in Count I
) and Count III (failure to update
ince I find Respondent's failure to
verification requirements serious,
ie civil penalty for seriousness of

The INS concedes that no unauthorized aliens were the subject of the fine in this case, therefore, I will fully mitigate the civil penalty for this factor.

Lastly, Respondent has no history of previous violations. Thus, I will also fully mitigate the civil penalty for this factor.

Based on the foregoing, I assess a civil penalty for Count I at $2,200.00 ($200.00 for each employee); $450.00 for Count II ($150.00 for each employee) $600.00 for Count III ($150.00 for each employee); and $300.00 for Count IV ($150.00 for each employee). The total for four Counts is $3,550.00.

ACCORDINGLY,

1. Respondent is hereby ORDERED to pay Complainant a civil monetary penalty in the amount of $3,350.00 for Counts I - IV of the Complaint; and

2. Pursuant to 8 U.S.C. § 1324a(e)(7), and as provided in 28 C.F.R. § 68.51(a), this Decision and Order shall become the final Decision and Order of the Attorney General as to Counts I through IV of the Complaint unless, within five (5) days of the date of this decision, a review is requested and after such request is made, and within thirty (30) days from this date, the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED, this _____ day of April, 1991, at San Diego, California.

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